IN THE

# Supreme Court of the United States

## OCTOBER TERM 1943

No. 627

CHARLESTON TRANSIT COMPANY, CHARLESTON-DUNBAR TRACTION COMPANY, AND CHARLESTON INTERURBAN RAILROAD COMPANY.

*Petitioners,*

*vs.*

STERLING NATIONAL BANK & TRUST COMPANY OF NEW YORK, Etc., as Trustee,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, AND BRIEF IN SUPPORT THEREOF.**

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IN THE

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## OCTOBER TERM 1943

No._____

CHARLESTON TRANSIT COMPANY, CHARLESTON-DUNBAR TRACTION COMPANY, AND CHARLESTON INTERURBAN RAILROAD COMPANY.

*Petitioners,*

*vs.*

STERLING NATIONAL BANK & TRUST COMPANY OF NEW YORK, Etc., as Trustee,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI.

*May it please the Court:*

The petition of Charleston Transit Company, a corporation, Charleston-Dunbar Traction Company, a corporation, and Charleston Interurban Railroad Company, a corporation, respectfully shows to this Honorable Court:

### I. SUMMARY OF THE MATTER INVOLVED

This is a suit in equity brought in the Circuit Court of Kanawha County, West Virginia, by respondent against petitioners and others to enforce certain *reassessment* certificates in the principal sum of $11,-

562.12 issued against Charleston-Dunbar Traction Company by the City of Dunbar, West Virginia, for the cost of repaving or resurfacing that part of a road which adjoined a narrow strip of land over which Charleston-Dunbar Traction Company owned an easement for a streetcar right of way. The reassessment was laid under the power thought to exist by virtue of Section 86, Chapter 7, Acts of the West Virginia Legislature 1921 (Municipal Charters). The cause was tried by the court without a jury. By final decree, entered December 31, 1941, the Circuit Court of Kanawha County, West Virginia, adjudged the reassessment certificates to be valid liens upon the abutting easement and rendered a personal judgmentt against petitioners, Charleston-Dunbar Traction Company, Charleston Interurban Railroad Company and Charleston Transit Company for the sum of $17,668.78, with interest thereon from the date of the judgment until paid, and costs. An appeal from said decree was allowed by the Supreme Court of Appeals of West Virginia, which Court, on March 26, 1943, by a two-to-two decision (one Judge not participating), affirmed the decree of the trial court. A petition for rehearing was seasonably filed and rehearing granted. On rehearing the Supreme Court of Appeals, on October 5, 1943, by a three-to-one decision (one Judge not participating), affirmed the judgment of the trial court without change in the former opinions (R. 614-629, inc.), except that Judge Rose withdrew his dissenting opinion of March 26, 1943 (R. 625).

A statement of the facts will be found at page 8 of the brief immediately following this petition.

## II. STATEMENT DISCLOSING THE BASIS ON WHICH IT IS CONTENDED THIS COURT HAS JURISDICTION TO REVIEW THE DECREE IN QUESTION

The jurisdiction of this Court is invoked under paragraph (b), Section 237, of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. § 344.

## III. QUESTIONS PRESENTED

The question in this case is whether petitioners have been deprived of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States:

(a) By the enforcement of a reassessment by the personal judgment against petitioners for a sum substantially in excess of the value, if any, added by the repaving of the abutting street to the mere easement for a streetcar right of way owned by petitioners;

(b) By the construction placed upon Section 86, Chapter 7, Acts of West Virginia Legislature of 1921 (Municipal Charters), by the Supreme Court of Appeals of West Virginia in this suit, which upholds the enforcement of a reassessment of paving costs by the City of Dunbar after a holding in a prior suit between the same parties, or their privies, by said Court that the City of Dunbar was without jurisdiction to repave or assess therefor. The ground of this prior holding was the complete omission by the Council of the City of Dunbar of the jurisdictional requirement of serving notice on Charleston-Dunbar Traction Company before the work began and failure to give it an opportunity to be heard before the Council determined to proceed

with the improvement, as required by Sections 64 and 67, Chapter 7, Acts of the West Virginia Legislature of 1921 (Municipal Charters);

(c) By the enforcement of an arbitrary, unreasonable and confiscatory reassessment in excess of any value added to the aforesaid right of way by the paving of an abutting street.

## IV. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Petitioners respectfully submit that there exist special and important reasons for the granting of the writ of certiorari herein prayed, namely:

1. The Supreme Court of Appeals of West Virginia has decided in this suit a Federal question of substance in a way not in accord with applicable decisions of this Court, in that it has decided that reassessment certificates for the cost of paving may be enforced not only by a lien upon the abutting property, but also by a personal judgment against the owner, for a sum far in excess of the special benefits conferred upon his abutting property by the paving;

2. The Supreme Court of Appeals of West Virginia has decided a Federal question of substance not heretofore determined by this Court, namely: Whether petitioners have been deprived of their property without due process of law by a judgment enforcing a reassessment for paving costs under Section 86 of Chapter 7, Acts of West Virginia Legislature of 1921 (Municipal Charters), where the original assessment had previously been declared void by said Court for failure of the City Council to serve notice and afford the opportunity

for hearing before the improvement was begun, as required by Sections 64 and 67, Chapter 7, Acts of West Virginia Legislature of 1921 (Municipal Charters).

The highest courts of the States of Ohio, Oregon, Illinois, Michigan, Oklahoma and New Jersey have reached a different conclusion from the Supreme Court of Appeals of West Virginia, such other courts having held that where a jurisdictional notice required by a city charter was omitted in connection with the original proceeding to improve and assess, a reassessment, under authority of a currently existing section of the same charter, could not be sustained. This question has not been passed upon by this Court;

3. The Supreme Court of Appeals of West Virginia has decided a Federal question of substance in a way not in accord with applicable decisions of this Court, in that it has decided that the enforcement of a reassessment for a sum far in excess of the special benefits conferred, against the owner of a mere easement for a right of way extending for half a mile over and upon the abutting land where the paving was undertaken, without service of notice or an opportunity to be heard before the improvement was begun as required by statute, does not violate the due process clause of the Fourteenth Amendment to the Federal Constitution.

WHEREFORE petitioners pray: That a writ of certiorari be issued out of and under the seal of this Honorable Court to review the judgment of the Supreme Court of Appeals of West Virginia entered on the 5th day of October, 1943, in the case numbered and entitled on its docket No. 9371, Sterling National Bank & Trust Company of New York, etc. v. Charleston Transit Company, a corporation, et al.; that the judg-

ment of said Court affirming the decree, entered on December 31, 1941, in said cause by the Circuit Court of Kanawha County, West Virginia, be reversed; and that petitioners may have such other and further relief in the premises as to your Honorable Court may seem just and meet.

And your petitioners will ever pray.

ROBERT S. SPILMAN,
*Counsel for Petitioners.*

J. M. WOODS,
HOWARD R. KLOSTERMEYER,
*Of Counsel.*

Dated: January 21, 1944.
Charleston, West Virginia.

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## BRIEF IN SUPPORT OF THE FOREGOING PETITION

### I.

### OPINIONS OF THE COURT BELOW

The affirming and dissenting opinions in the Supreme Court of Appeals of West Virginia upon the rehearing are reported in 27 S. E. 2d. 256 (R. 614-629, inc.).

### II.

### JURISDICTION

1. The date of the judgment or decree to be reviewed is October 5, 1943 (R. 613).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. 344.

3. Petitioners asserted their rights to the protection of the due process clause of the Fourteenth Amendment to the Constitution of the United States by their protest filed with the Council of Dunbar on the reassessment on November 21, 1932 (R. 180); by their demurrers to the bill of complaint (R. 105 & 107); by their answers to the bill of complaint (R. 109-136); and by appropriate assignments of error in the Supreme Court of Appeals of West Virginia (R. 13). These questions were passed upon by the Circuit Court of Kanawha County, West Virginia (R. 237), and the Supreme Court of Appeals of West Virginia (R. 614-625). Petitioners also invoked the protection of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by their pro-

test filed with the Council of Dunbar on November 21, 1932 (R. 180), and by their answers to the bill of complaint (R. 109-136).

4. Among the cases believed to sustain the jurisdiction of this Court as required by Rule 12, Paragraph 1, and Rule 38, Paragraph 2 (c), of the Rules of this Court, are:

*Standard Pipe Line* v. *Miller*, 277 U. S. 160;

*Ireland* v. *Woods*, 246 U. S. 323;

*Rust Land & L. Co.* v. *Jackson*, 250 U. S. 71;

*Road Improvement Dist.* v. *Missouri-Pacific R. R. Co.*, 274 U. S. 188;

*Spencer* v. *Merchant*, 125 U. S. 345;

*Scott* v. *McNeal*, 154 U. S. 34;

*Brinkerhoff* v. *Hill*, 281 U. S. 673;

*Home T. & T.* v. *Los Angeles*, 227 U. S. 278;

*Georgia Ry. & Elec. Co.* v. *Decatur*, 295 U. S. 165.

## III.

## STATEMENT OF THE FACTS

Prior to December 1928, there existed a macadam road between the cities of Charleston and Dunbar, in Kanawha County, West Virginia. Approximately one-half mile of this road lay within the corporate limits of the City of Dunbar. The Council of the City of Dunbar, on June 18, 1928, decided to repave or resurface this half mile of road, known as Dunbar Avenue, from Industrial Street in said City to the eastern corporate limits thereof, and to assess the cost of the repaving against the owners of the abutting property.

This repaving work was undertaken under Section 85, Chapter 7, Acts 1921 West Virginia Legislature (Municipal Charters).[1] Section 85 refers to Section 61, which in turn is related to Sections 63, 64 and 67. Hence it is necessary to examine all of these sections to determine the necessary procedure for making a valid assessment.[2] At that time Charleston-Dunbar Traction Company owned merely an easement for a street railway right of way over a strip of land 30 feet wide which abutted upon the road. The Charleston Interurban Railroad Company, which owned all the stock of the Charleston-Dunbar Traction Company and was also the lessee of the Charleston-Dunbar Traction Company easement, operated a street railway line between Charleston and Dunbar, a distance of about 7 miles. The streetcar line ran parallel to the road. The western terminus of the line was in Dunbar and the westernmost 2600 feet of the right of way abutted on the road to be repaved. The Council proceeded to repave the road and, without hearing any evidence, adopted a resolution whereby it determined that the easement was specially benefited by the paving, and laid a special assessment for $11,562.12 against Charleston-Dunbar Traction Company as the owner of the right of way easement. Certificates representing this assessment were issued to the contractor, Luigi Lemma, who assigned the certificates at a 25 per cent discount to Herbert C. Heller & Company. The certificates were not paid, and Herbert C. Heller & Company instituted suit in the Circuit Court of Kanawha County to enforce the same. The defendants

[1] All italics in this brief are ours.

[2] Sections 61, 63, 64, 67, and 85, Chapter 7, Acts of West Virginia Legislature, 1921, are set out in full in the Appendix.

in that suit were the petitioners Charleston-Dunbar Traction Company and Charleston Interurban Railroad Company, and also Luigi Lemma and the City of Dunbar. The certificates were held void by the Circuit Court of Kanawha County upon three grounds, namely:

> 1. That no assessment had been laid against Charleston Interurban Railroad Company and that company owned no properties in the City of Dunbar subject to assessment for the paving of Dunbar Avenue;
>
> 2. That the paving of Dunbar Avenue was not a benefit to the property of Charleston-Dunbar Traction Company; and
>
> 3. That the special assessment for the cost of the paving was not legally and lawfully laid and the paving certificates issued thereon were not legally and lawfully issued against Charleston-Dunbar Traction Company or Charleston Interurban Railroad Company.[3]

On appeal to the Supreme Court of Appeals of West Virginia, the decision of the trial court was affirmed.[4] The Supreme Court of Appeals of West Virginia, in the *Heller* case, decided that the assessment was void by reason of the failure to serve upon Charleston-Dunbar Traction Company the notice required by Section 64 of the Dunbar Charter. The holding was that

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[3] A copy of the printed record in the case of *Herbert C. Heller & Co.* v. *Charleston-Dunbar Traction Co., et al.*, in the Supreme Court of Appeals of West Virginia, duly certified by the clerk of said Court, is presented herewith as Exhibit A. If the writ be granted, it will be incorporated in the printed record here in accordance with the stipulation of counsel filed in the Supreme Court of Appeals of West Virginia.

[4] See *Herbert C. Heller & Co.* v. *Charleston-Dunbar Traction Co.*, 112 W. Va. 299, 164 S. E. 853.

such notice was a mandatory, jurisdictional requirement.

Within two years after the decision in the *Heller* case, Herbert C. Heller & Company presented to the Council of the City of Dunbar a petition requesting that a reassessment be made pursuant to the provisions of Section 86, Chapter 7, Acts of 1921 (Municipal Charters).[5] Pursuant to this petition the Council of Dunbar, on November 7, 1932, without hearing any evidence, adopted an ordinance in which it was determined that the easement owned by Charleston-Dunbar Traction Company was specially benefited by the repaving and fixed November 21, 1932, as a date for

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[5] "Sec. 86. In case of the construction of any pavement, sewer, sidewalk or other permanent improvement under the provisions of this act, *when an assessment shall be void or voidable by reason of errors, irregularities or defects* in the proceedings under which such improvements shall have been made, or in case such assessment shall been made against the wrong person, it shall be the duty of the council, within two years after any court shall have declared such assessment invalid, to cause notice to be given to any person against whom the cost of such improvement might properly have been assessed under this act, of its intention to lay such assessment against him, and fixing a time and place at which he may appear and show cause, if any, why such assessment should not be laid. Said notice shall be served as provided in this act for the giving of notices in assessment proceedings, or in any other manner provided by law, including by publication, if the person is a non-resident of the city or can not be found.

At the time and place fixed for a hearing under the notice aforesaid, the council shall proceed to lay and levy an assessment for the cost of such permanent improvement *in such manner as would have been lawful under proper proceedings at the time said improvement was made*, unless the person so notified shall show good cause why the same should not be laid, and no further notice of such assessment shall be necessary. *The assessment so laid shall be a lien upon the property liable therefor*, as of the date of the original void, or voidable, assessment, and shall be recorded in the same manner as is hereinafter provided. This section shall apply to assessments made and certificates issued under section eighty-five of this act, as well as to other assessments and liens for public improvements."

hearing protests (R. 69 & 172). Notice of the proposed reassessment was served upon Charleston-Dunbar Traction Company and Charleston Interurban Railroad Company. On November 21, 1932, they appeared before the Council, filed a written protest setting out the grounds of their objection, among them the violation of the equal protection and due process clauses of the Federal Constitution (R. 180). On January 23, 1933, evidence was taken before the Council on the question of whether the repaving conferred any special benefits upon the easement. The evidence offered consisted of a reading of the transcript of the evidence adduced in the Circuit Court in the suit previously brought by Herbert C. Heller & Company to enforce the first certificates (R. 556-609),[6] with the additional testimony of one witness on behalf of Herbert C. Heller & Company,—L. E. Parsons, a real estate agent (R. 593). On the same night the Council overruled the protests and adopted certain ordinances prepared (R. 173) in advance by counsel for Herbert C. Heller whereby the same sum was again assessed against Charleston-Dunbar Traction Company.

Upon the issuance of the second certificates to Luigi Lemma, the contractor, he assigned them to Herbert C. Heller & Company in place of the original void certificates. Subsequently Herbert C. Heller & Company changed its name to Special Assessment Securities Corporation. Having pledged the original certificates with the United States Mortgage & Trust Com-

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[6] As to this evidence the Supreme Court of Appeals of West Virginia, in the *Heller* case, supra, said: "The evidence taken by the traction company on the question of benefits to it, shows that it received no benefits from the improvement, on the contrary, that it was a severe detriment to its property and materially lessened its value."

pany as Trustee to secure an issue of municipal trust ownership certificates pursuant to a written agreement of April 2, 1927, it also delivered the reassessment certificates to said trustee. Thereafter, Sterling National Bank & Trust Company of New York became successor trustee to the United States Mortgage & Trust Company and, as such, instituted this suit July 17, 1935, for the purpose of enforcing the reassessment certificates.

The portion of the right of way abutting on the repaved road is 30 feet wide and 2600 feet long. There was one shed, valued at $25.00 (R. 574), on the right of way,—otherwise it contained no structures, except the ties, rails, poles and trolley wires used in connection with the streetcar line. There were two strings of wires about 20 feet apart, supported on overhead arms by a center line of 25 or 26 poles set about 100 feet apart (R. 565). But for the ballast under the car tracks the land over which the streetcars operated would have been swampy. The land was rough and rocky, not suitable for agriculture, nor desirable for practical real estate purposes (R. 565). The repaving of the road did not open up any new territory for the streetcar line or make it more accessible to patrons (R. 578). The easement was used only for street railway purposes, and no revenue was ever derived from any other use.

In 1920 the City of Dunbar had a population of approximately 1500 people (R. 578). In 1930 its population was 4,189 (R. 576).

Charleston is the capital city of West Virginia. Approximately 2.6 miles of the 7-mile line lay within the corporate limits of the city of Charleston. Approximately 4.4 miles lay between the western limits of

Charleston and the terminus of the streetcar line at Industrial Avenue in the town of Dunbar (R. 576). Gross revenues from the entire Charleston-Dunbar streetcar line, including the portion within the City of Charleston, were: 1921—$150,907.15; 1929—$120,319.17; 1930—$113,818.75 (R. 578).

In 1932, Charleston Interurban Railroad Company defaulted in payment of interest on its bonds, and default in interest on the bonds of Charleston-Dunbar Traction Company, which interest had been guaranteed by the Charleston Interurban Railroad Company, was imminent. A plan for the readjustment of the finances of these two companies, as well as of the Kanawha Valley Traction Company, another of its wholly-owned subsidiaries, was proposed by Charleston Interurban Railroad Company on October 10, 1932 (R. 371). The plan was finally accepted by over 90% of the bondholders upon condition that if it should be consummated a majority of the voting stock of the new corporation should be deposited in a voting trust for a period of not less than 5 nor more than 10 years, vesting control of the new corporation in representatives of the bondholders (R. 470).[7]

On December 6, 1932, Roxalana Land Company, a bondholder, instituted suit in the Circuit Court of Kanawha County against the three streetcar companies and the trustees under the mortgages securing their bonds, praying the appointment of a receiver. A receiver was appointed who operated the properties for some time. In that suit, the assets of the three com-

[7] This plan was approved by the Circuit Court of Kanawha County as fair to all creditors, stockholders and bondholders, after service of notice on all parties and published notice to unknown creditors, stockholders and bondholders (R. 371, 384-394, 516).

panies were marshalled and, pursuant to the procedure in West Virginia, a reference was had to a commissioner in chancery to determine the liens and debts of the three companies. While the commissioner made no finding as to whether the reassessment certificates constituted a lien upon the property of the Charleston-Dunbar Traction Company, he reported that *there were no unsecured obligations of said company* (R.462). The report of the commissioner was confirmed and the properties of all three companies were ordered sold at public auction. The decree of sale directed that the Tenth Parcel, consisting of the entire 7 miles of right of way, with the track, poles, trolley wire and ballast, between Charleston and Dunbar be sold, "subject to the claim of a lien" (R. 367), but without admission of the validity of the lien of the paving certificates. At the sale held on January 11, 1935, said Tenth Parcel was offered separately and a bid of $18,000.00 was received (R. 331). Then the entire properties of all three companies were offered together as a whole, and Robert S. Spilman, Jr., acting for a committee of the bondholders of all three companies, made a bid of $325,-525.00 for the whole, which, being the highest bid, was accepted (R. 331). This bid was apportioned by the special commissioners, with approval of the court, to the various parcels owned by the several companies involved. The sum of $20,000.00 was apportioned to the entire 7 miles of right of way between Charleston and Dunbar owned by Charleston-Dunbar Traction Company (R. 338). The purchaser having acquired the property as the representative of the bondholders, assigned his purchase to a new corporation, Charleston Transit Company, which had been created for the purpose of acquiring and operating the properties.

Charleston Transit Company carried out the plan of reorganization by creating the voting trust and issued its securities in accordance with the plan. Under this plan, each holder of One Thousand Dollar face amount of Charleston-Dunbar Traction bonds received $699.30 in first and second mortgage bonds, plus accumulated interest (R. 378). All of the property of Charleston-Dunbar Traction Company, the 7 miles of right of way, its track, poles, a car barn, substation and everything it owned, was assessed by the Board of Public Works of West Virginia for 1928 at $58,868.00, and for 1929 at $52,076.00.

The reorganized company, Charleston Transit Company, paid no dividend on its common stock from the date of its creation, January 1, 1935, to July 16, 1940 (R. 351).

On June 30, 1939, it discontinued the operation of all streetcars, began the operation of buses, and has not since used the streetcar easement for any purpose. The rail on the one-half mile of easement here involved was subsequently sold for $1,725.00 (R. 351).

## IV.

## SPECIFICATION OF ERRORS

The Supreme Court of Appeals of West Virginia erred in:

1. Holding that a reassessment under Section 86, Chapter 7, Acts of West Virginia Legislature 1921 (Municipal Charters), could be enforced by a personal judgment in the amount of the reassessment certificates, where the amount of such reassessment substantially exceeds the value, if any, added to the abutting property by the improvement.

2. Construing Section 86 of Chapter 7 of the Acts of West Virginia Legislature, 1921 (Municipal Charters), in such manner as to render worthless petitioners' right to notice and a hearing before the Council determined to proceed with the repaving, as provided by Sections 64 and 67 of the Dunbar Charter.

3. Holding that the enforcement of the reassessment, under the circumstances of this case, did not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

## V.

## ARGUMENT

**Point A—The judgment in personam for a sum in excess of the special benefits conferred on the abutting right of way by the paving violates the due process clause of the Fourteenth Amendment to the Federal Constitution.**

In 1925 the Legislature of West Virginia amended Section 85 of the Charter of the City of Dunbar, which dealt with paving by the certificate plan.[8] The 1925 amendment provided that "the *amount specified* in said *assessment certificate* shall be the personal debt of the property owner and a lien as aforesaid." It is under this statute that the personal judgment here was imposed.

This amendment was in nowise an attempt to amend Section 86 of the Charter, which dealt solely with the matter of reassessment. At the time of the reassessment in this case, Section 86 remained in the Charter in its original form. Section 86, under which the re-

[8] Chapter 29, Sec. 88, Acts 1925 West Virginia Legislature, Municipal Charters.

assessment was made, does not provide for a personal judgment, it merely provides that the reassessment shall be a lien. The obvious reason for this is that in proper case a reassessment could be made and enforced as a lien to prevent some property owner from getting the benefit of an improvement which was merely void for some technical reason without paying for it. Yet, the effect of the decree appealed from is to read into Section 86 the words of the 1925 amendment to Section 85. In this case the result is to compel a property owner to pay for special benefits he did not receive.

Although the Supreme Court of Appeals of West Virginia has sustained the validity of statutes imposing personal liability,—*Werninger* v. *Stephenson*, 82 W. Va. 367, *Engineering Co.* v. *Gallaher*, 101 W. Va. 110, and *Elkins* v. *Stickley*, 114 W. Va. 103,—it has been also held that the enforcement of an original special assessment by a personal judgment where the amount of the assessment exceeds the value added to the abutting property violates the inhibition of the Constitution of West Virginia against the taking of private property for a public use without just compensation. *St. Marys* v. *Locke*, 73 W. Va. 30. In the case of *Moundsville* v. *Brown*, (W. Va.)[9] 25 S. E. 2d 900, decided June 1, 1943, the Supreme Court of Appeals of West Virginia approved the *Locke* case and said that the enforcement of a paving assessment by means of a personal judgment which exceeds in amount the value added to the abutting property by the improvement cannot be sustained.

In the instant case the trial court recognized there was a lack of *substantial* benefits. Its opinion (R. 520) reads:

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[9] Not yet officially reported.

> "The record does not disclose *such an entire lack of special* benefit as would warrant my holding that the plaintiff's certificates are void on this collateral attack."

Yet, taking the opinion at its face value, we have a holding or recognition by the trial court that there is a lack of any substantial benefits in this case. The implication of the language of the opinion is that there is almost, but not quite, an entire lack of benefits. It is submitted that, to the extent the easement alleged to have been specially benefited is worth less after the repaving than the amount of the reassessment certificates, the judgment *in personam* for the face amount of the certificates deprives petitioners of their property without due process of law.

We submit the evidence discloses a *complete* lack of any special benefit. Following this repaving, which did not open up any new territory or make the carline any more accessible to patrons, but merely encouraged travel between Charleston and Dunbar by private automobile, revenues declined, receivership ensued, bondholders' claims were scaled down, buses supplanted streetcars, and the easement was abandoned. This abandonment came about by reason of obsolescence of the street railway system, which, in turn, was hastened if not originated by competition of private vehicles traversing the very road, parallel to the streetcar line, which petitioners are asked to pay for improving (R. 577, 585). That loss of rail traffic ensues when paved roads adapted to use by motor driven vehicles are constructed parallel to railroads is also common knowledge and received distinct recognition in the President's message to Congress of December 8, 1922. *Road Improvement Dist.* v. *Missouri-Pacific R. R.*, 274 U. S.

188. Petitioners are quite willing, if they have any interest in this land since its abandonment for street railway purposes, to surrender their interest for whatever amount it will bring (upon fore-closure of the lien upon petitioners' easement), to be applied on these paving certificates, but beyond the value of the easement they cannot constitutionally be called upon to pay one cent. *Georgia Rwy. & Elec. Co.* v. *Decatur*, 295 U. S. 165; *St. Marys* v. *Locke* and *Moundsville* v. *Brown, supra.*

The vice of a personal judgment for the cost of public improvements is well stated in the case of *Asbury* v. *City of Roanoke*, 91 Va. 562. The language of the Virginia Court is particularly pertinent here, in view of the testimony of the witness Mitchell that he could buy all of the lots in Dunbar he wanted for the paving cost (R. 564).

The Supreme Court of Appeals of West Virginia, in the case of *City of Elkins* v. *Harper*, 82 W. Va. 377, in speaking of a reassessment made under a separate curative statute, pointed out that reassessments were justified because of the moral obligation resting upon the property owners benefited by the improvement. When the benefits have been recovered the moral obligation ceases. It is therefore necessary to scrutinize carefully the matter of special benefits before enforcin a reassessment by a personal judgment.

Stated differently, it may be said that the object of a reassessment is to prevent the abutting property owner from becoming unjustly enriched. That purpose can be accomplished by the enforcement of the lien of the reassessment without resort to the vicious device of a personal judgment. The enforcement of a reassessment by means of a personal judgment bears no

reasonable relation to the very worthy purpose of a reassessment. It is not necessary to impose a personal judgment in order to prevent unjust enrichment of the owners of abutting property. If their property has been specially benefited by the paving, above and beyond the general benefits to the community at large, the special value added to the property is in the property, and the city or certificate holder can be recompensed by a foreclosure sale of the abutting property. The knowledge that a personal judgment can be obtained for a worthless "improvement" not only encourages speculators in municipal paving certificates to advocate paving in rural communities in advance of the need, but affords opportunity for such speculators to collect from property owners, — even those whose statutory rights to notice and a hearing were disregarded,—not only the amount of the special benefits actually conferred upon their property, but sums far in excess of the value of their abutting property. Thus excessive liability can be enforced by a judgment which can be levied upon the stocks, bonds, money and other property, real or personal, of the victim. Such a result is contrary to the basic theory underlying special assessments for special improvements. The personal judgment here is excessive, harsh and unjust, and, because it bears no substantial relation to the purpose sought to be obtained, and exceeds by far the value, if any, added to the easement violates the due process clause of the Fourteenth Amendment.

The only cases decided by this Court involving the enforcement of special improvement assessments by means of a personal judgment are *Davidson* v. *New Orleans*, 96 U. S. 97, and *Dewey* v. *Des Moines*, 173 U. S. 193. The former is not in point, for there all of

the requirements of the statute were complied with. Furthermore, that case did not involve a reassessment, nor did it involve the other elements present here, such as failure to observe jurisdictional requirements, lack of special benefits, and a confiscatory assessment. The latter case held that a personal judgment, based merely on service by publication, could not be taken against a non resident.

**Point B—The holding of the West Virginia Supreme Court that the failure to give notice to Charleston-Dunbar Traction Company before the work began and an opportunity to protest before the Council determined to proceed with the work, as required by Sections 64 and 67 of the Dunbar Charter, can be cured upon a reassessment under Section 86 of said Charter, deprives Petitioners of their property without due process of law.**

The Dunbar Council did not serve notice on the Charleston-Dunbar Traction Company at least three days before the work began. Nor was an opportunity given either Charleston-Dunbar Traction Company or Charleston Interurban Railroad Company to be heard before the Council determined to proceed with the improvement. Both notice and an opportunity to be heard were required by Sections 64 and 67 of the Dunbar Charter. Although it operated streetcars into Dunbar daily, the notice was returned "not found"[10] as to the Charleston Interurban Railroad Company, and as to it, notice by publication was given, as if it were a non resident.[11] The original assessment was held void for these reasons. *Heller & Co.* v. *Traction*

[10] See pp. 91 and 101 of the printed record in *Heller & Co.* v. *Traction Co.*, Exhibit A.

[11] *Dewey* v. *Des Moines*, 173 U. S. 193.

*Co., supra.* Thus, the Charleston - Dunbar Traction Company, as owner of the abutting easement, was deprived of a substantial right which the Legislature of West Virginia intended it to have,—the right to appear and protest before the work began and before the Council determined to proceed with the improvement. The question is whether or not this is a right guaranteed to it by the due process clause of the Fourteenth Amendment to the Constitution of the United States. The requirements of notice and an opportunity to be heard before the work began were held to be mandatory and jurisdictional by the Supreme Court of Appeals of West Virginia in the *Heller* case, *supra.* Also, in *Fogle* v. *Trust Co.*, 116 W. Va. 713, 717, it was said that the requirement of this very Dunbar Charter for notice before the Council determined to proceed with a public improvement was based upon constitutional requirements. To what constitutional provision could this statement of the court refer, if not the due process clause?

In the present case, the Supreme Court of Appeals of West Virginia has not departed from or modified its holdings in the *Heller* and *Fogle* cases, and apparently it would still hold that the failure to serve notice or to give an opportunity to be heard, as required by Sections 64 and 67 of the Dunbar Charter, rendered void an original assessment. But the effect of the decision in the instant case is that, notwithstanding the failure to serve notice and give an opportunity to be heard before the launching of the improvement in the first instance, as required by the Charter, the Council may cure the omission of these jurisdictional requirements by a reassessment under Section 86 of the Charter. In order to reach this conclusion, the Supreme Court

of Appeals of West Virginia necessarily violated the well-settled rule of statutory construction that every part of an act is presumed to be of some effect and is not to be treated as meaningless unless absolutely necessary. *State* v. *Jackson*, 120 W. Va. 521.

The effect of the court's decision in this case is to nullify the plain language of Sections 64 and 67 of the Dunbar Charter, which required notice and a hearing before the work began. It is obvious that if the omission of a jurisdictional requirement can be cured, the requirement itself is an idle gesture. Furthermore, the court's decision renders meaningless the words "for errors, irregularities or defects," found in Section 86,—for under Section 86 it is not all void assessments that may be reassessed. Only those which are void for certain stated reasons, namely, irregularities, errors or defects, come within the curative purview of the statute. A complete omission is not an error, an irregularity or a defect which can be cured on reassessment.

*Mosser* v. *Moore*, 56 W. Va. 478;
*Dequasi* v. *Harris*, 16 W. Va. 345;
*Jackson* v. *Kittle*, 34 W. Va. 207;
*Orr* v. *Wiley*, 19 W. Va. 150;
*Joyce* v. *Barron*, 67 Ohio St. 264;
*Groel* v. *Newark*, 78 N. J. L. 142;
*People* v. *Wisconsin*, 219 Ill. 94;
*Murray* v. *LaGrande*, 76 Ore. 598;
*City of Enid* v. *Gensman*. 76 Okla. 90;
*Thayer Lbr. Co.* v. *City of Muskegon*, 157 Mich. 424;
*Crawford* v. *Detroit*, 169 Mich. 293;
*City of New Cordell* v. *Mansell*, 169 Okla. 166;
COOLEY, Taxation, 4th Ed. Vol IV, § 1590, p 3135.

If the complete omission of a jurisdictional requirement can be cured under Section 86 of the Dunbar Charter, then, as stated in *City of Enid* v. *Gensman*, *supra:*

> " * * a municipality, in utter disregard of the rights of the property owners, may force upon them an improvement which they do not desire and when confronted with a decree of court based upon its disregard of the lawful and jurisdictional requisites of procedure, restraining it from fixing a charge upon the property owner, may then, even in a case reeking with fraud and bribery, fold about it the mantle of a reassessment."

We understand that in determining whether or not the construction placed upon Section 86 of the Dunbar Charter by the West Virginia Supreme Court of Appeals deprives petitioners of a constitutional right, this Court, in a case where such construction is challenged on constitutional grounds, will not be bound by the construction placed upon that statute by the State court, but will make an independent investigation and place its own construction upon the statute.

*Scott* v. *McNeal*, 154 U. S. 34;
*Yick Wo* v. *Hopkins*, 118 U. S. 356;
*Mobile & O. R. Co.* v. *Tenn.*, 153 U. S. 486;
*Huntington* v. *Attrill*, 146 U. S. 657;
*Rogers* v *Alabama*, 192 U. S. 226.

While the due process clause "does not take up the statutes of the several States and make them the test of what it requires,"—*Herbert* v. *Louisiana*, 272 U. S. 312,—plain departure from the material requirements of the State statute is highly indicative that the action

complained of is arbitrary, unreasonable and violative of that constitutional guaranty. In *Castillo* v. *McConnico*, 168 U. S. 674, cited with approval in *Lombard* v. *West Chicago Park Com.*, 181 U. S. 33, it was said:

> " 'The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the 14th Amendment and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative nor coterminous.
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> " 'The first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the state, and, as it is solely the result of such authority, may vary or change as the legislative will of the state sees fit to ordain."

The provision for notice before the work begins in the Dunbar Charter was placed there for the benefit of the property owner. He was given a right to be heard in opposition to the improvement, as to the kind of improvement, the nature of the improvement, as well as the cost thereof, before the work was undertaken. The Council had a duty to hear and consider protests before it decided to go ahead with the project. Yet, under the decision in this case, the Council could deliberately plan a project which would ruin the abutting property, fail to give notice to the owner, and yet when confronted with a decree of the highest court of the State that its action was void, give notice, *after the damage was done*, go through the formality of a hearing, and compel the owner to pay for the privilege of having his property ruined. This right to

notice and a hearing is a substantial right not to be treated lightly.

But it will be argued that, under the decisions of this Court,—*Utley* v. *St. Petersburg*, 292 U. S. 106, and *Spencer* v. *Merchant*, 125 U. S. 345, as well as *Heavner* v. *Elkins*, 69 W. Va. 255,—notice of the laying of an assessment after the work was begun satisfies the due process clause. It is submitted that no case decided by this Court goes so far as to hold that an abutting property owner has been accorded due process of law by the enforcement of a lien and a personal judgment against him for the cost of an alleged improvement made by a city in utter disregard of reasonable and material requirements of its charter which, if observed, would have afforded him notice and an opportunity to be heard *before* the improvement was undertaken; particularly where, as here, his property was not specially benefited by the alleged improvement. If this Court lacks the power under the due process clause to require State courts and municipalities to conform to jurisdictional requirements imposed by the State Legislature, then the due process clause of the Federal Constitution is no protection against the arbitrary exercise of powers by local governmental bodies.

*Spencer* v. *Merchant*, 125 U. S. 345, is not in point, for the statute there involved did not require notice before the work began. Nor did the statute involved in the case of *Utley* v. *St. Petersburg* require notice before the work began. The charter of Elkins involved in *Heavner* v. *Elkins*, *supra*, did not require notice. Those cases merely hold that *in the absence of a statute* requiring notice and an opportunity to be heard, the due process clause is satisfied by notice at some stage

of the proceeding. But where, as here, the statute requires notice and a hearing before the work begins, can it be said that the due process clause does not require their observance?

Furthermore, the instant case is distinguishable from the line of cases such as *City of Elkins* v. *Harper*, *supra*, where examination of the statute will reveal that, subsequent to the declaration of invalidity of the first assessment, the Legislature enacted a statute expressly permitting the curing of the very defect for which the original assessment was held void.[12] The corrective procedure here (Section 86) was a part of the charter at the time the original void assessment was made.

Notice and an opportunity for hearing are fundamental elements of due process. The notice provided by Section 86 of the Dunbar Charter as late as two years after the improvement has been made, is not the equivalent of the notice at least three days before the work is begun required by Section 64, or of the opportunity of a hearing before the Council determines to proceed afforded by Section 67. Notice under Section 86 was not intended to and cannot serve the same purpose as notice and an opportunity to be heard before the work begins. Yet the decision in this case renders worthless these rights which we believe are within the protection of the due process clause of the Federal Constitution.

The Supreme Court of Appeals of West Virginia could have avoided this unconstitutional result by construing Sections 64, 67 and 86 of the Dunbar Charter in *pari materia*, in which case the proper construction

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[12] See *Whetsell* v. *City of Elkins*, 68 W. Va. 709; Sec. 28, Chap. 12, Acts W. Va. Legislature 1915 (Municipal Charters) p. 433.

would be that an original assessment, void for complete omission of the jurisdictional requirements of Sections 64 and 67, cannot be reassessed under Section 86; that the reassessment provisions of Sections 86 are only intended to cure formal errors, irregularities and defects in proceedings where the Council had acquired jurisdiction in the first instance under Sections 64 and 67. (See Judge Fox's dissenting opinion, R. 626.)

**Point C—The reassessment is arbitrary, unreasonable and confiscatory and therefore violative of the Federal Due Process Clause.**

It is well-settled in West Virginia that there can be no valid assessment for the cost of a special improvement in the absence of special benefits to the abutting property, as distinguished from general benefits to the community as a whole.

*Bowling* v. *Bluefield*, 104 W. Va. 589;
*Elkins* v. *Harper*, 82 W. Va. 377;
*St. Marys* v. *Locke*, 73 W. Va. 30.

The evidence is conclusive, it seems to us, that the assessment is confiscatory. The witnesses Mitchell, Moore, Hill and Samworth testified (R. 563-587) that the repaving of the street did not add anything to the value of the street railway right of way. The land was rocky and but for the ballast would be swampy. It was not suitable for any other use. Its use was restricted by grant. It could not be used for agriculture, or even for ordinary commercial purposes. The paving did not open up any new territory. It did not create feeders or lateral roads connecting with the main highway. It did not make the streetcar line any more accessible to patrons.

In *Standard Pipe Line* v. *Miller*, 277 U. S. 160, it was held:

> "An assessment of five thousand dollars per mile upon the right of way of a pipe line for road improvement purposes is arbitrary and unreasonable where the benefit which it can receive from the improvement is small."

The assessment here at the rate of $23,000 per mile against a mere easement for a streetcar right of way, which could not receive special benefits from the improvement, is even more arbitrary and unreasonable. This reassessment must be borne by the owner of a mere servitude upon the land, which was not in fact and could not possibly be enhanced in value by the paving, while the owners of the land themselves are not called upon to pay anything.

The reassessment is confiscatory. The total assessed value of all the property of the Charleston-Dunbar Traction Company for 1929, including 7 miles of right of way, track, trolley wire, poles, and a brick substation building, was only $52,076.00 (R. 274). This assessment, against 1/14th of the length of its right of way, amounts to over one-fifth of the total assessed value for tax purposes of all the property of the company.

The gross revenue from this entire line in 1929 was only $120,319.17 (R. 578),—that is at the rate of approximately $17,000 per mile, or approximately $8,500 per half-mile. Thus, the principal of the assessement exceeds by approximately $3,000 the gross revenue allocable to this half-mile right of way for the year 1929. We have already shown the decline in the revenues of this line following the repaving. This Court has considered the matter of revenues as an

index of whether special improvements conferred special benefits.

*Kansas City S. R. Co.* v. *Road Improvement Dist.*, 266 U. S. 379;

*Road Improvement Dist.* v. *Missouri-Pacific*, 274 U. S. 188.

The total amount bid in 1935 for the 7 miles of right of way, including the track, trolley wire, poles and ballast, when offered separately at judicial sale was only $18,000 (R. 336). The principal amount of the assessment against 1/14th of the length of the right of way amounts to almost two-thirds of the amount bid for the entire 7 miles in 1935.

When the street railway was abandoned, the rail laid on this half-mile of right of way brought only $1,725 (R. 351), as compared with the assessment of $11,562.12.

In addition to the fact that the repaving conferred no special benefits on the right of way and was confiscatory in nature, the manner in which the Dunbar Council determined the existence of special benefits was capricious and arbitrary. On March 19, 1928, before the original assessment was laid, the Council, without hearing any evidence on the subject, adopted a resolution[13] determining that petitioners' property, —its easement,—was specially benefited by this improvement. When the matter of reassessment came up in 1932 the Council of the Town of Dunbar, on November 7, 1932,—two months before any evidence was offered,—again determined that the easement was specially benefited.[14]

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[13] P. 99, Exhibit A.

[14] R. 69.

On January 23, 1933, the Town Council heard the same evidence (with the additional testimony of L. E. Parsons (R. 593), which we submit did not show that the easement was specially benefited by the repaving) that had been heard by the Circuit Court of Kanawha County. Notwithstanding the views of the Circuit Court and the Supreme Court in the *Heller* case as to the effect of this evidence, the Council, having prejudged the question twice before without hearing any evidence, on January 23, 1933, adopted the reassessment ordinance, which had been prepared in advance by counsel for Heller & Company.

Although characterized by the Supreme Court of Appeals of West Virginia as a sufficient hearing and made after due deliberation, we question that the hearing of January 23, 1933, was the full, fair and unbiased hearing required by the due process clause. *Morgan* v. *U. S.*, 304 U. S. 1.

In the recent case of *Betts* v. *Brady*, 316 U. S. 455 (1942), it was said by this Court that the asserted denial of due process is to be tested by an "appraisal of the totality of the facts involved in a particular case"

In summary, the facts here reveal:

(a) Paving laid and the cost assessed in disregard of mandatory jurisdictional requirements of a city charter as to notice and a hearing;

(b) A reassessment by a town council which, having twice prejudged the question of special benefits, without hearing any evidence, could hardly be expected to weigh the evidence when it was offered;

(c) A reassessment for the cost of paving a road parallel to the streetcar line, which did not make the streetcar line any more accessible to its patrons or open up any new territory;

(d) A reassessment of paving costs in the amount of $11,562.12 against a mere easement over a strip of rocky, swampy land, 30 feet in width and 2600 feet in length, the use of which was restricted by grant, and which is now rendered useless for even this restricted purpose by the very paving for which petitioners are asked to pay;

(e) A tortured construction of the reassessment section of the Dunbar Charter, at variance with long established rules of statutory construction;

(f) A personal judgment against a new corporation, which acquired the easement at judicial sale subject only to the lien of the assessment *against the easement*, if, indeed, it should be so adjudged;

(g) A personal judgment against petitioners for a sum far in excess of any special benefits which were or could possibly be conferred upon its easement by the repaving of the abutting street.

The appraisal of the totality of these facts leads to the inevitable conclusion that due process of law has been denied petitioners.

## CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari,

and thereafter reviewing and reversing the decision of the Supreme Court of Appeals of West Virginia.

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